Willmar Electric Service, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 46 *and* Michael C. Hendrix. Cases 19–CA–20137 and 19–CA–20138

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On September 1, 1989, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order.

The sole issue remaining in dispute in this case is whether the judge correctly concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Michael Hendrix, who was employed full time as an organizer for the Union at the time of his application for a job with the Respondent. In exceptions, the Respondent contends, inter alia, that it could lawfully refuse to hire Hendrix on the basis of his status as a paid union organizer because such an individual is not an employee within the meaning of Section 2(3) of the Act. For the reasons set forth below, we find no merit in this argument.

Michael Hendrix is a journeyman electrician. On June 23, 1988,[1] Hendrix began working as a full-time field organizer for the Union. During June and July, Hendrix contacted the Respondent about entering into an agreement with the Union for the Respondent's electrical subcontracting project at a J. C. Penney store under construction in Silverdale, Washington. For the remainder of the year, Hendrix had frequent conversations with the Respondent's officials about this subject.

Beginning on or about August 30 and continuing into January 1989, Hendrix also communicated on several occasions with the same officials about job prospects both for himself and for other local union members. On October 14, Hendrix delivered his own and another electrician's completed job applications to the Respondent's project foreman, Douglas Rose. These were the first local job applications received from outside the company. In subsequent communications with the Respondent's officials, Hendrix expressed his continuing interest in working for the Respondent, noting in particular the appeal of a jobsite close to his residence. On December 30, Hendrix telephoned Rose and asked if the Respondent was hiring and had considered his application. Rose stated he was hiring but had not considered Hendrix's application because ''it's kind of hard to hire you when you're out there on the other side, picketing.'' (Hendrix had engaged in area standards picketing and handbilling protests at the Respondent's jobsite from November 30 until December 15.) Hendrix told Rose to consider him seriously for a job, that obtaining employment to carry out field organizing responsibilities is customary activity for field organizers, and that Hendrix would be organizing during lunch and after work. The Respondent never offered Hendrix a job.

Although not mentioned in the judge's decision, Hendrix testified that union officials knew about his application for employment by the Respondent, but that he received no direction from the Union to seek employment with the Respondent. Hendrix testified that seeking employment was normal activity for field organizers. In his testimonial opinion, he would have to take a leave of absence from employment with the Union if hired by the Respondent, but he would retain his title as field organizer. He also testified that he would be paid only by the Respondent for work performed for it. He did not know whether the Union would reimburse him for any shortfall in compensation, but he was willing to take a reduction in pay to work for the Respondent.

As set forth fully in the judge's decision, he found that during December and January 1989 the Respondent manifested an antiunion hiring policy through the violation of Section 8(a)(3) in refusing to hire applicant Haugen and through several antiunion statements made by Rose in violation of Section 8(a)(1). There are no exceptions to these findings. The judge also concluded that the Respondent violated Section 8(a)(3) by refusing to hire Hendrix because of his union activities. In the discussion supporting this conclusion, the judge stated, ''That Hendrix was a paid, fulltime union organizer, intent upon organizing Respondent's employees, is of no moment.'' In support of this statement, the judge cited *H. B. Zachry Co*., 289 NLRB 838 (1989), in which the Board found an unlawful refusal to hire a paid, full-time union organizer. In its exceptions, the Respondent supports its argument that paid full-time union organizer Hendrix is not a protected employee within the meaning of Section 2(3) of the Act by reference to the opinion denying enforcement of the Board's Order in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), a decision that issued after the judge's decision in this case.

After careful review of the Fourth Circuit's analysis in *Zachry*, we adhere to the Board's holding in that case that individuals who are full-time paid union organizers while applying for a job are protected Section

[1] All dates are in 1988, unless otherwise indicated.

2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status.[2] In any event, we find that this case is factually distinguishable from *Zachry* on points critical to the Fourth Circuit's determination that the paid union organizer there should be excluded from the statutory definition of employee.

In *Zachry*, the court held that an employer could lawfully reject a job applicant who would be simultaneously paid and supervised by the union. In support of this holding, the court emphasized stipulated evidence that Edwards, the paid union organizer/job applicant at issue, planned to remain concurrently employed and supervised by the union during his hours of work for Zachry and would have been performing services for Zachry only because directed to do so by the union. In addition, the union would have paid Edwards for the difference between his salary at Zachry and his full union salary, for his health, life insurance, and pension benefits, and for daily transportation expenses and living expenses related to the Zachry job.

Here, by contrast, Hendrix's uncontroverted testimony is that: he received no specific direction from the Union to seek employment with the Respondent; if hired by the Respondent, he would have to take a leave of absence from employment by the Union; he would limit any organizational activity to personal time at lunch and after work; he would not receive direction from the Union during hours of work for the Respondent; he was willing to take a reduction in pay to work for the Respondent; and he did not know whether the Union would reimburse him for any shortfall in compensation. In sum, although Hendrix clearly intended to serve the Union's organizational interests as an employee of the Respondent, there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for the Respondent. Furthermore, there is no evidence that Hendrix would terminate his job with the Respondent at the end of any organizational campaign rather than at the completion of a job project conveniently close to his home.

Although we adhere to the Board precedent set in *Zachry* and cases cited therein, we believe that the aforementioned circumstances in this case indicate that Hendrix would not have been ''[an employee] working for two different employers at the same time and for the same working hours.''[3] Therefore, his job application did not raise the same concerns about divided employment loyalties and interests which underlay the Fourth Circuit's conclusion in *Zachry* that paid organizer Edwards was not entitled to antidiscrimination protection as an employee within the meaning of Section 2(3) of the Act.

Based on the foregoing, we find that Hendrix was an employee within the meaning of Section 2(3). In agreement with the judge's analysis of the Respondent's motivation for refusing to hire Hendrix, we affirm the finding that this refusal violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Willmar Electric Service, Inc., Silverdale, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[2] It is a well-established principle of Board law that the Sec. 2(3) definition of employee includes applicants for employment. Accordingly, prospective employee applicants are entitled to the same statutory protection against antiunion discrimination as current employees, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940); and paid union organizers are entitled to the same protected Sec. 2(3) status as other applicants, *Oak Apparel*, 218 NLRB 701 (1975). An employer may, however, lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer. The Respondent here did not prove that it refused to hire Hendrix pursuant to any such nondiscriminatory policy. In this regard, we reject the Respondent's contention that it did not hire Hendrix because he was only interested in a foreman's job for the reasons discussed by the judge.

[3] *H. B. Zachry Co. v. NLRB*, supra at 73.

Max Hochandel, Esq., for the General Counsel.
Judd Lees, Esq. (Williams, Kastner, & Gibbs), of Bellevue, Washington, for the Respondent.
John Burns, Esq. (Hafer, Price, Rhinehart & Schwerin), of Seattle, Washington, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Seattle, Washington, on April 6 and 7, 1989. The consolidated complaint, based on charges filed by International Brotherhood of Electrical Workers, Local Union No. 46 (the Union) and Michael C. Hendrix, an individual, issued on February 22, 1989, and alleges that Willmar Electric Service, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by failing to employ Hendrix and Allen Haugen for its job on a J. C. Penney store in Silverdale, Washington, in late 1988.[1]

The complaint also alleges that Respondent, by its project foreman, Douglas Rose, independently violated Section 8(a)(1) in seven instances in late 1988 and early 1989: by asking a job applicant in November if he was ''connected with a union,'' by subsequently telling an employee there was ''no way [he] would hire any union people,'' by asking

[1] Sec. 8(a)(3) forbids an employer from ''discriminat[ing] in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.'' Sec. 8(a)(1) prohibits an employer from ''interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7'' of the Act. Sec. 7 guarantees employees ''the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .''

an applicant on about December 28 if his previous employers ''were union contractors,'' by telling an applicant on about December 30 that it would be ''hard to hire'' him and that Rose ''would not do so'' because the applicant had picketed at the jobsite, by asking an employee on about January 9 if he knew their ''little union buddy'' Hendrix, by telling an employee on about January 16 that a no-applicants sign at the jobsite ''was intended only for applicants affiliated with a union,'' and by asking an employee on about February 7 ''if he had been contacted by an agent of the [National Labor Relations] Board.''

I. JURISDICTION, LABOR ORGANIZATION

Respondent is a multistate electrical contractor headquartered in Willmar, Minnesota. The complaint alleges, the answer admits, and I conclude that it is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties also agree and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Evidence*

Respondent is the electrical subcontractor on a J. C. Penney store under construction in the Silverdale Mall, Silverdale, Washington. Douglas Rose, a journeyman electrician, is its project foreman. He reports to Bryan Johnson, regional projects manager, who is located in Aurora, Colorado, and to Johnson's superior, Timothy Imdieke, operations manager, who works out of the home office in Willmar. Imdieke testified that, while he and Johnson ''work together with'' Rose as concerns hiring for the Silverdale project, Rose is empowered to hire independently within prescribed manpower limits.[2]

Respondent contracted for the job in the early summer of 1988; and Rose, unassisted, started doing preliminary work on the site in August. Rose hired his son, Todd, as an apprentice in early September. Jack Hitt, a journeyman recently on another of Respondent's projects, joined the crew in mid-October. Rose's affidavit states that Hitt was ''responsible for orienting the newer employees to the work'' as later hirings occurred. The complement grew to 10 on January 3 and 4, with the addition of 3 journeymen and 4 apprentices. All seven came from the surrounding area and none had worked for Respondent before.

Respondent thereafter continued to hire apprentices or trainees from the surrounding area. The several journeymen it later hired had been on its payroll before, however, and came from afar.

Imdieke testified that Respondent has been party to a union contract only once that he knows of, on a 1984 project. Asked if Respondent ever hired union members, Imdieke testified, ''That's a tough one''; then added, ''I basically wouldn't know . . . but at times [employees] have mentioned that they belong to an organization.''[3] Rose testified that he does not have the ''slightest idea'' if the Silverdale payroll includes members, nor does he ''really care.'' The record contains no evidence that any of those hired for that project was then a member.

Hendrix is a journeyman electrician. He has been a full-time field organizer for the Union since June 23, 1988, having taken a leave of absence from his position with an electrical contractor.

In late June, upon learning that Respondent would be the electrical subcontractor on the Penney project, Hendrix called Imdieke, asking about Respondent's manpower needs. Imdieke said he had not ''looked at'' the situation yet, but probably would be getting to it ''in a couple weeks.'' Hendrix called again in mid-July, expressing an interest ''in sitting down and talking . . . about a contract'' for the project. Imdieke told him to send a copy of the Union's standard contract, and that he would ''get with'' his boss about it.

Hendrix thereupon mailed Imdieke a rough draft of the Union's newly ratified contract. The two then had a telephone conversation on July 25, in which Imdieke said that Respondent was ''not interested in signing any kind of agreement, but . . . would be interested in looking at some of [the Union's] people.'' That was followed by a letter from Hendrix to Imdieke, dated July 27, in which he proposed ''a one-project agreement that will not bind you on any other projects in the country.''

Hendrix first met Rose on a visit to the jobsite on August 30. Introducing himself as a union organizer and tendering his business card, he asked Rose about job prospects and, as he had with Imdieke, broached the idea of Respondent's signing a project agreement. Rose responded that ''things were really slow'' on the project, the implication being that those matters were of no immediate concern, and the conversation turned to hunting and fishing.

In the aftermath of this first encounter with Hendrix, Rose entered in his daily job log:

> IBEW labor organizer came to jobsite, seems to have vast knowledge of [Respondent]. Wants us to sign a labor agreement, said he has talked to Tim, etc. Mostly small talk but what he comes out with gives me the impression that they have targeted [Respondent] for the infiltration of union members.

Rose's log reveals that he and Hendrix had a second conversation on September 1, with Hendrix saying he would like to have a job application form before Rose began hiring. Hendrix added that he was not working in the trade, according to the log, and summarized his qualifications as an electrician. Rose responded that he had no applications. Following that conversation, still tracking the log, Rose ''discussed the union issue'' with Imdieke and Johnson, and they ''decided to not give out applications until all angles have been checked.'' Asked what he meant by ''all angles,'' Rose testified: ''You'll have to ask them [Imdieke and Johnson]. . . . That was the reply I got when I talked to Tim.''

On September 2, Rose and Johnson resumed the previous day's conversation. Rose's log states: ''Discussed hiring policies concerning union help, discrimination.'' The record provides no additional information concerning the exchange. Rose testified that he also spoke with the Associated Build-

[2] Mirroring this, Rose states in his affidavit that he does ''all the reviewing and final approval of applications locally.''

[3] Thus, Imdieke went on, an employee in Danville, Virginia, ''mentioned he belonged to a local . . . in the last couple of months.''

ers and Contractors, to which Respondent belongs, at about this time; and was told, in answer to his queries about the Union, that it is ''bad news.''

Hendrix continued to call on Rose with some regularity. In the early visits, at least, they chatted congenially and at length about hunting and fishing, although Hendrix generally interjected the subjects of an agreement and hiring, as well. According to Rose's affidavit, his customary rejoinder, when Hendrix raised those subjects, was that Respondent ''went through the State for applicants'' and that it was ''nonunion and wanted to stay that way.''

On September 7, Hendrix asked Rose for an application. Rose replied that he had none; that he thought the home office ''was going to do the hiring'' and Hendrix therefore should ''contact'' it; and that Respondent ''probably'' would not need help until about December. Hendrix, in his role as field organizer, consequently wrote Imdieke on September 9, stating:

> I have been in contact with your foreman . . . in Silverdale, Washington. He has indicated to me that your office would be doing the hiring in Willmar.
>
> I am still interested in signing a project agreement with your Company and offering our qualified Journeymen to your Company. Please consider this offer.
>
> Doug [Rose] said that he did not have any employment applications on site and that I should contact you at your office. Would you please send me one of your application [sic].

First conferring with Respondent's labor attorney in Minneapolis, Imdieke mailed Hendrix an application on about September 16.

In late September, Rose told Hendrix that he foresaw a crew of ''somewhere around 10 to 15'' electricians, and that he was ''going to pursue'' local hiring.

On October 14, Hendrix delivered two completed applications to Rose, one being his own. Rose testified that these were the first he had received ''except for people within the company.'' He and Hendrix had a ''very brief'' attendant conversation, in which Hendrix ''verified'' his work experience and stated, as he was to do several times, that a job with Respondent especially appealed to him because ''it's right over the hill from [his] house.''

Where his application asked for ''Position Desired,'' Hendrix entered: ''Journeyman-Foreman Electrician.'' Rose inferred from this, so he testified, that Hendrix was interested only in being a foreman. Hendrix testified that he did not tell Rose this, however, and the record contains no intimation that Rose questioned him on the point.[4]

Rose sent Hendrix's application, but not the other one, to Imdieke. In his covering note, he stated:

> Mike Hendrix came in today and left two applications. Please note the date of the application.[5] In reading over his application I've noticed he is applying for a foreman position. He also states he has had a strained back. Also, you'll notice he is presently working for 21.00.
>
> The way I see it, he is already working, has a questionable back, and if he was hired as a foreman, I'd have nothing to do. My opinion is WES should not hire him at this time, however, you may have a position for him up there. I'll keep in touch.

Upon receiving the application, Imdieke again conferred with Minneapolis counsel. He testified that he then ''talked briefly'' with Rose, who remarked that Hendrix was seeking his foreman's job; and that he, Imdieke, rejoined: ''Well, that's not my policy. He wouldn't be foreman.''[6]

On November 7, journeyman Newell Casavant submitted an application. He testified that Rose mentioned in the accompanying conversation, that Hendrix had ''come by'' and that Respondent ''might be going union''; and asked Casavant ''how [he] felt about that.'' Casavant assertedly replied that ''it didn't bother'' him.

Another journeyman, Jerry Jones, applied on November 17. The following week, he testified, he told Rose he had gained his experience ''through the Union,'' prompting Rose to ask if he was ''still affiliated with the Union'' and how he felt ''about working for a nonunion shop.'' Jones replied, as he recalled, that he had ''hard feelings against'' the Union and was no longer a member; and Rose remarked, ''Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion.''

Rose admittedly asked Jones how he felt about working for a nonunion shop. He explained:

> I asked a lot of people that. I ask that because of the possibility of picketing, and I asked people a lot of times, ''Do you have any problems crossing the picket line, does that bother?'' . . . There are several questions like that, just general stuff.

Jones further testified that Rose told him, in November, that he ''liked to hire locally because you could give the economy a boost,'' and that he intended to hire from 16 to 20 people.

On November 30, Hendrix and two others began picketing Respondent at the jobsite. The signs stated: ''Willmar Electric, Substandard Wages.'' Picketing continued until December 15. Hendrix estimated that he participated ''the majority of the time.'' The picketing was preceded by letters to Respondent and the general contractor, on union stationery and signed by Hendrix, detailing the inadequacy of Respondent's wages and benefits relative to area standards, and informing them of the impending picketing. Hendrix and others distributed leaflets at the site, as well.

On December 14, as revealed by the records of the Washington State Employment Service, Rose advised its Bremerton office that Respondent ''need[ed] journeymen and other experienced electricians.'' Rose's affidavit states that, while he did not specify how many employees he was seeking, he ''was actually looking for . . . 5 journeymen and 4 or 5 apprentices on this job.'' Then, on December 27, as disclosed by Employment Service records, Rose told it that Respondent

[4] Hendrix testified that he would have taken ''whatever they had''; that he ''would have went to work as a grunt for them.''

[5] Hendrix entered two dates on his application: September 28 at the top and October 10 on the signature line. He testified that he began filling it out on September 28 and finished on October 10.

[6] Imdieke testified that his ''general practice and a good practice'' regarding the hiring of foremen is: ''It's got to be somebody I know and somebody that came up through the ranks.''

had ''all the inexperienced help needed,'' but still invited the referral of ''journeymen and other experienced electricians.'' This stood until January 13, when Rose instructed the Employment Service that Respondent's needs had been met. These records and his affidavit to the contrary, Rose testified that he was ''mostly looking for apprentices'' when he placed the December 14 order, because he ''had made up [his] mind who [he] was going to be putting on as a journeyman already''; and that he was not seeking journeymen in late December inasmuch as he ''had made a decision to put on'' Casavant, Jones, and one Ray Gauthier ''prior to'' that.

Haugen, a journeyman electrician and a member of the Union, entered the picture on December 28. Having obtained an introduction card from the Employment Service, he called Rose that afternoon, requesting an interview. Haugen testified that Rose asked if he was a journeyman or a trainee; exclaimed, ''Oh, great!'' upon Haugen's saying he was the former; and urged Haugen to come to the site ''right away.'' Rose also stated, per Haugen, that Respondent ''had all the trainees [it] needed,'' but that he still ''wanted'' journeymen.[7] Rose concedes that Haugen ''probably'' identified himself as a journeyman; and that he in turn said, ''Good,'' and invited Haugen to come to the site. He denies telling Haugen, however, that he ''need[ed] journeymen.''

Haugen arrived at the site and filled out an application a few minutes later. He testified that others also were filling out applications; that he heard Rose ask another, unidentified person, ''How many of these guys do you want?''; and that the other person replied, ''As many as you can get.''

When Haugen handed his application to Rose, Rose asked about his work experience. Haugen answered that he had had ''a lot of experience working at the mall,'' including nine months during its construction and in the Sears and Bon Marche stores. Rose then asked if Haugen's past employers were unionized, according to Haugen, and he said they were. Rose presently brought the interview to an end, Haugen testified, by saying the application ''look[ed] good,'' and that he would ''make a few phone calls and . . . get back to'' Haugen.

Rose would have it, on the other hand, that he said Respondent ''didn't need any more journeyman electricians,'' that he had ''made up [his] mind who [he] was going to hire already,'' and that he ''would put [Haugen's] application in the file.''[8] Asked if he inquired about Haugen's union status, Rose answered, unresponsively, that he was ''very busy that day,'' and that his exchange with Haugen was ''just a quick where-have-you-been-working, are-you-from-the-area type of thing.''[9]

On December 30, Hendrix called Rose, asking if he was hiring; and, by Hendrix's account, this exchange ensued:

> Rose: ''Yes, we're hiring right now, looking for guys.''
>
> Hendrix: ''Have you considered my application?''
>
> Rose: ''Which one?''
>
> Hendrix: ''Mine.''
>
> Rose: ''Oh, not really.''
>
> Hendrix: ''Why not?''
>
> Rose: ''Well, it's kind of hard to hire you when you're out there on the other side, picketing.''
>
> Hendrix: ''I'm not picketing anymore.''
>
> Rose: ''You were picketing.''
>
> Hendrix: ''Well, I'm not anymore.''

Rose did not explicitly deny any of the foregoing in his live testimony. But, asked if he *recalled* telling Hendrix ''he would not be hired because he picketed the company,'' Rose replied, ''No, I do not.'' In his affidavit, on the other hand, he denies telling Hendrix ''that [he] could not hire him because he was picketing and/or was on the other side.''

The remainder of the conversation, by more or less mutual agreement, consisted of Hendrix's saying he was experienced in the ''kind of work'' Respondent was doing and would do ''a good job''; that all his past employers ''would give [him] an A-1 rating''; and that he had been ''in the industry for 10 years.'' Hendrix also told Rose that, if hired, he ''would be organizing during the lunch hour.'' He then suggested that Rose ''wouldn't like that,'' and Rose agreed. Hendrix testified that to ''obtain employment . . . to carry out . . . field organizing responsibilities'' is ''normal activity for field organizers.''[10] As the conversation wound down, Rose said he ''hadn't looked at'' Hendrix's application. Hendrix urged that he ''seriously take a look at it and consider [him] for a job,'' and that he ''let [him] know one way or the other.''

Among the entries in Rose's log for December 30 is this:

> Mike Hendrix said he'd like to come to work with our understanding that he would be trying to organize the crew during lunch and after work.

During the first week of January, journeyman Joseph Lesh gave Rose his application. Lesh testified that Rose told him he ''would be hiring'' and would ''get back to'' Lesh.[11]

On January 4, not having heard from Rose, Haugen telephoned the job. Rose's wife, Sandra, employed as Respondent's secretary, answered, saying Rose was busy and to call back in half an hour. Sandra testified that she then spoke to her husband, who told her he was no longer hiring. When Haugen called back, Sandra said Respondent had ''hired all the people [it was] going to hire,'' but would keep his application on file. Haugen, voicing the suspicion that he was not hired because he is ''union,'' asked to speak to Rose, saying he wanted to ''explain some things.'' Sandra said Rose was too busy to come to the phone, terminating the conversation.

Apparently on January 4, as well, Rose received a ''cluster'' of six applications sent by Hendrix.[12] One had been

[7] Haugen later testified that either Rose or the Employment Service told him this, and that he ''believe[d] it was [in] the phone conversation with Mr. Rose.''

[8] Rose states in his affidavit that, before Haugen's arrival on the December 28, he ''had already called the State to tell them [he] was full earlier that day.'' He acknowledged in his live testimony that he could not recall that.

[9] Rose's affidavit asserts that he ''did not ask [Haugen] any questions about his union affiliation,'' but that he ''did tell him it was a nonunion job.'' Haugen had asked if it was ''a union job,'' according to the affidavit, and offered that his last job ''was union.''

[10] Hendrix opined that, if hired by Respondent, he would retain his title as field organizer, but that his pay ''would stop from the IBEW.'' He did not know if the Union would make up the difference should working for Respondent entail a pay cut.

[11] Lesh never did hear from Rose. He testified that a past employer listed on his application, Evergreen Electric, is ''a union outfit.''

[12] The record is unsettled regarding the date of receipt. Hendrix's cover letter is dated December 21, Rose's affidavit states that he received the applica-

Continued

filled out and signed by journeyman Dwayne Macomber; the others had been filled out and signed by Hendrix on behalf of people on the Union's out-of-work list from whom he had obtained permission. On January 6, Macomber called Rose about the status of his application. Rose ''expressed ignorance of it,'' as Macomber recalled, but said he would check and call back.[13] Rose called the next day, reporting to Macomber that he had ''only just received'' the application, that ''all positions were filled,'' and that he would keep the application on file.

By letter dated January 6, Rose returned the six applications to Hendrix. The letter states, variously, that Respondent's practice'' is to ''hire employees on an individual basis or, when necessary, through a local job service,'' and not ''through any other organizations, recruiters, etc.''; that those ''seeking employment in the electrical field should apply in writing a letter, along with their resume,'' to the home office; and that, ''at the present time, we have filled our employment needs for this project.''

Macomber testified that he called Rose again a couple weeks later, and that Rose said the six applications ''were unacceptable,'' explaining that Respondent ''couldn't accept applications from a labor organization.'' Macomber asked if Respondent had rejected his application because of his union membership, he recounted, and Rose answered, no, that Respondent had ''union people on the job.''

Rose did not address these conversations with any specificity in his testimony. Asked generally if he ever said ''there was no way [he] would hire any union people,'' he testified:

> I don't believe I made that statement at all. That would be a silly thing for me to say. We joke around a lot. I just would not say that, no.

On January 9, a Monday, Rose asked apprentice employee Lafayette (Dean) Brooks, if he knew Hendrix. Hendrix had passed out leaflets at the site the previous Friday, engaging Brooks in a several-minute conversation as Brooks left the job. Not knowing Hendrix by name, Brooks asked Rose whom he was referring to. Rose answered that Hendrix was ''our little union buddy.'' Brooks then affirmed that he had spoken with Hendrix. Rose testified that he called Hendrix his ''little union buddy on several occasions'' in conversation with employees.

On January 14, Haugen called again, this time speaking to Rose. He stated that he did not intend ''to cause any union problems at all''; that ''a union person can do a high-quality job and not cause any problems.'' Rose shot back that ''being a union member or not ha[d] no bearing'' on his hiring decisions; that Haugen was ''not the only one that had called and said'' the contrary; and that he was ''tired of hearing that.''[14] Rose added that he would not be hiring again ''till June or July.''

In mid-January, Jones, one of the three journeymen to start on January 3–4, told Todd Rose that he had a friend who would make a good apprentice for Respondent, but that he was discouraged from pursing the matter because of the recently-posted sign that Respondent was not accepting applications. Todd came back: ''[T]hat's just for the Union. If he's any good, just tell my father, and they'll just bypass that.''

Soon thereafter, Rose asked Jones if he knew of a good prospect. Jones answered, ''Yes, but your sign says that you're not taking applications.'' Rose stated, by Jones' uncontradicted account, that the sign was ''just for the Union's benefit.'' Jones' friend, Steve Medlock, submitted an application on January 20 and was promptly hired.

Rose admittedly continued to take applications despite the sign. He denies, however, that the sign was calculated to thin out union-member applicants. The reason for it, he testified, was that he ''did not have time for a lot of people coming in and out'' because ''there were some changes in J.C. Penney's plans that needed to be addressed immediately.''

On January 17, Rose fired Dean Brooks. Jones testified that Todd Rose had commented, the day before: ''Well, we found out who the union rat is. It's a guy named Dean Brooks.'' Todd went on, according to Jones, that Respondent would remain nonunion ''by not hiring union people''; that his dad ''puts a check on people somehow'' and ''wouldn't hire'' anyone known to be ''for the Union.'' Jones' recital continued that, after Brooks' termination, Todd remarked that Respondent had ''killed two birds with one stone'' inasmuch as Brooks ''was not a good worker'' and was ''a union sympathizer.'' The record contains no evidence that Todd Rose performed supervisory or managerial functions for Respondent. He lived and often commuted to the job with his father, however; and Rose conceded—''sure''—that he talked to Todd about the union situation on the project.

On February 7, Jones testified, Rose said to him that an agent of the NLRB had called Casavant; then asked if the agent had called him. Rose, averring that Casavant had ''volunteered'' to him that he had been called by a Board agent, admitted that he later conversed with Jones and other employees whether they had been called. Rose termed it ''just common jobsite banter.'' The Board agent was investigating the charges underlying the complaint herein.

Respondent offered neither Hendrix nor Haugen a job. Asked why he did not make an offer to Hendrix, Rose testified:

> I didn't think he was serious at all. I thought he was very serious about maybe putting some people from his organization on at work, but I didn't think that he was serious at all in his venture to go to work for Willmar Electric.

Rose testified that he did not take Hendrix's application seriously ''because he was full-time working, expressed that he enjoyed his job very much, why come to work for me?'' Two of the journeymen who began on January 3–4, Jones and Ray Gauthier, had their own electrical-contracting businesses, however, and were hired with the understanding that they would be leaving if their businesses picked up. Gauthier accordingly did leave in late January, to meet the needs of his business; then returned, on a part-time basis, in March. Attempting to distinguish the Hendrix situation from those of Gauthier and Jones, Rose testified, ''It had to do with he was very happy with what he was doing and had no intention of quitting . . . and coming to work.'' Rose concededly ''didn't

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tions on about the December 27, and Rose's log states that he got them on the January 4. The log presumably is the most reliable.

[13] Upon his receipt of them, Rose sent the six applications to Respondent's Minneapolis counsel.

[14] The State Employment Service questioned Respondent whether it was hiring around union members.

even consider'' asking Hendrix if he would quit his union job should Respondent hire him.

Imdieke, citing Hendrix's position with the Union and Respondent's stated perception that he was interested only in being a foreman, likewise testified that he ''couldn't take'' Hendrix's application ''seriously.''

Rose testified that he did not hire Haugen because:

> At that time, I had made a decision . . . to hire Ray Gauthier or Jerry Jones and Newell Casavant. And, also, at that time there was rumblings that there would be some transfers coming up [from Respondent's other projects]. Mountain Home [Idaho] was running out of work. But, right at that very specific time, I needed ten people.

Casavant, Gauthier, and Jones all ''walked in''; that is, they applied independently of the State Employment Service, the Union, or any other referral source. Rose testified that he told Casavant ''on the first of December'' that he could have a job; that he made similar commitments to Gauthier and Jones on December 15 and 27, respectively; and that he considered the three hired as of those times. Respondent's records and Rose's affidavit state, however, that Casavant was hired on January 4, Gauthier on December 30, and Jones on December 28.

Casavant testified that, while Rose told him in ''the first part of December'' that he ''probably'' could start on January 3 or 4, Rose did not confirm that until January 3, when he told Casavant to report the next day. Casavant further testified that he quit his former job on December 23 because he was ''tired'' of it and ''thought [he] had a pretty good chance of getting this job'' with Respondent. Jones testified that Rose told him on December 27 or 28 to ''come in and fill out some paperwork''; and that he complied on December 28, at which time Rose directed him to report on January 3. Gauthier did not testify.

As previously noted, Respondent hired only former employees to meet its journeyman needs after January 3–4. The first of these was Junior Sam, who began on January 15. He was followed on February 6 by Willard King, on February 15 by Mike Froseth, and on February 16 by Jim Wirt. They had been on projects recently completed in either Mountain Home, Idaho, or Fallon, Nevada.

Rose testified, concerning the staffing of jobs: ''I usually call the unemployment office. That's a standard procedure to pick up help from.'' Another ''standard procedure,'' he testified, is to ''talk to different people to see if there is, within the company, . . . people who are going to be coming in'' from other projects. His affidavit states that past employees ''would be given first preference if they want to move here on their own.'' But Rose admittedly did not follow this latter procedure incidental to assembling the early January crew.

Imdieke testified that Respondent ''prefer[s] transfers'' over strangers; that his ''concern'' as projects are ''shutting down,'' is to ''keep them working''; and, with that in mind, that he discusses staffing with Johnson several times a week—what is ''coming up,'' what is ''shutting down,'' ''where people are available, where they aren't.''[15] Asked why Respondent had hired no former employees for the Silverdale project before Sam, Imdieke testified that ''you have to have the need and you have to have the availability,'' and that ''a little of both'' was lacking earlier.

In mid-February, Respondent increased its employees' workweek to include 8 hours of overtime. Jones testified that Rose explained:

> [W]e're not going to hire any more people. We're going to try and do it the way that we've been going. We like the crew and we like what's going on and . . . we're just going to start going on overtime.

Rose testified that the reason for the change was ''to eliminate peaks and valleys in employment,'' and that he, Imdieke, and John Chapin, Respondent's president, participated in the underlying deliberations.

Rose previously had told Jones that Respondent ''does not practice, as a rule, overtime,'' and would be unlikely to do so at Silverdale ''unless Penney's picks up the tab.'' Rose acknowledged that Penney's ''did not volunteer at any time to pick up any overtime,'' and that ''it's a known fact that overtime does not pay.''

B. *Conclusions and Reasons*

1. The alleged independent violations of Section 8(a)(1)

(a) *That Rose asked an applicant, in November, if he was ''connected with a union''*

(b) *Said there was ''no way [he] would hire any union people''*

Crediting Jones, he told Rose in late November that he had gained his experience ''through the Union,'' prompting Rose to ask if he was ''still affiliated with the Union'' and how he felt ''about working for a nonunion shop.'' Jones replied that he had ''hard feelings against'' the Union and no longer was a member, to which Rose remarked, ''Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion.''[16]

The Board decreed in *Rossmore House*[17] that the test for determining the legality of an interrogation is ''whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.''[18] Since *Rossmore House*, the Board has reiterated its long-held position ''that questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired.''[19] The conversation in which the subject questions were asked, occurring a few days after Jones had left off his application and before he was hired, was in the nature of a job interview. Rose therefore violated Section 8(a)(1) as alleged by asking those questions.

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[15] Even so, according to Imdieke, Respondent generally does not keep electricians on the payroll between projects. The weight of evidence indicates that the so-called transferees are treated as new hires at the next project. Respondent does not pay their moving expenses.

[16] Rose admittedly asked Jones how he felt about working for a nonunion shop, and did not disavow the other remarks attributed to him by Jones.

[17] 269 NLRB 1176 (1984).

[18] *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985), explaining *Rossmore House*.

[19] *Gilberton Coal Co.*, 291 NLRB 344 (1988). See also *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

Further, by stating to Jones Respondent's resolve to stay nonunion, Rose necessarily conveyed the impression that an applicant's being openly prounion not only would be pointless, but would prejudice his job prospects. So doing, he additionally violated Section 8(a)(1) substantially as alleged.[20]

(c) *That Rose asked an applicant, on about December 28, if his previous employers ''were union contractors''*

Crediting Haugen, Rose asked him, when he turned in his application on December 28, if his past employers were unionized.[21] This was a thinly veiled inquiry into Haugen's union feelings; and, occurring in the context of a job interview, was inherently coercive in violation of Section 8(a)(1).[22]

(d) *That Rose told an applicant, on about December 30, that it would be ''hard to hire'' him, and that Rose ''would not do so,'' because the applicant had picketed the jobsite*

Crediting Hendrix, Rose told him during a telephone conversation on December 30 that he had not ''considered'' Hendrix's application because ''it's kind of hard to hire you when you're out there on the other side, picketing.''[23]

Hendrix, when picketing to protest Respondent's wage and benefit levels, was an ''employee'' within Section 2(3) of the Act, engaged in an activity protected by Section 7.[24] Rose's remarks, by inherently tending to restrain Hendrix from engaging in that and similar activities, violated Section 8(a)(1) as alleged.[25]

(e) *That Rose asked an employee, on January 9, if he knew their ''little union buddy'' Hendrix*

Crediting the uncontroverted testimony of then-employee Lafayette (Dean) Brooks, Rose asked him on January 9 if he knew Hendrix. Brooks, not knowing Hendrix by name, asked who that was. Rose answered, ''Our little union buddy.'' Hendrix had engaged Brooks in conversation the previous workday, while handbilling at the site.

Brooks reasonably could have inferred (as do I) that Rose's purposes in asking the question were to apprise him that his tete-a-tete with Hendrix had not gone unnoticed and to elicit information indicative of Brooks' union sympathies. The record contains no evidence that Brooks was openly prounion, whereas Respondent's antipathy to the Union was manifest. I therefore conclude, applying the totality-of-circumstances test mandated by *Rossmore House*, that Rose's question bore a restraining and coercive impact in violation of Section 8(a)(1).

(f) *That Rose told an employee on about January 16, that a no-applicants sign ''was intended only for applicants affiliated with a union''*

Crediting Jones' uncontroverted testimony, Rose asked him in mid-January if he knew someone Respondent might hire. Jones answered, ''Yes, but your sign says that you're not taking applications.'' Rose rejoined that the sign was ''just for the Union's benefit.''[26]

By thus declaring Respondent's aversion to union-connected applicants, Rose violated Section 8(a)(1) as alleged.

(g) *That Rose asked an employee, on about February 7, ''if he had been contacted by an agent of the Board''*

Again crediting Jones, Rose told him on February 7 that an NLRB agent had called a coworker, Casavant; then asked Jones if the agent had called him.[27]

Interrogations of this sort, even under the guise of ''common jobsite banter,''[28] tend to dampen employee cooperation with Board investigations unless accompanied by assurances against retribution. They consequently work to diminish employee rights under the Act. Accordingly, Rose's question violated Section 8(a)(1) as alleged.[29]

2. The alleged violations of Section 8(a)(3) and (1)

(a) *Guiding Principles*

The Board stated in *Wright Line*:[30]

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

(b) *Hendrix*

I conclude that the General Counsel has made the requisite prima facie showing that Respondent's failure to hire Hendrix violated Section 8(a)(3) and (1).[31] My reasons for this conclusion are:

1. Hendrix quite obviously is a competent journeyman, and his application preceded those of the local-area journeymen who were hired.

[20] *L. W. Le Fort Co.*, 290 NLRB 344 (1988); *Big Star No. 185*, 258 NLRB 300 (1981); *Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 80, 83 (1979).

[21] Instead of refuting Haugen, Rose testified unresponsively when asked if he had inquired about Haugen's union status. The denial in his affidavit does not offset Haugen's convincing testimony on the point.

[22] See fn. 19, supra, and accompanying text.

[23] Hendrix's testimony in this regard was altogether convincing. Beyond that, Rose did not enter an explicit denial, testifying only that he could not *recall* saying Hendrix ''would not be hired because he picketed.'' The explicit denial in his affidavit, standing alone, deserves little credence.

[24] That he was picketing in the course of his employment with the Union makes no difference. *H. B. Zachry Co.*, 289 NLRB 838, 840 fn. 4 (1988).

[25] E.g., *California Cooperative Creamery*, 290 NLRB 355 (1988); *Haco Engineering Co.*, 265 NLRB 27 (1982).

[26] While testifying that the sign was not calculated to thin out union-member applicants, Rose did not deny making this remark. Jones was altogether convincing in any event.

[27] Rose in effect admitted doing this.

[28] Rose's depiction.

[29] *Scotto's I.G.A.*, 249 NLRB 909 (1980). The Board there affirmed the administrative law judge's finding of a violation on facts similar to the present. See also *Bohemia, Inc.*, 266 NLRB 761 (1983).

[30] 251 NLRB 1083, 1089 (1980). This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

[31] That Hendrix was a paid, full-time union organizer, intent upon organizing Respondent's employees, is of no moment. *H. B. Zachry Co.*, supra at fn. 24.

2. Respondent apparently has a policy against hiring known union members. The record contains no evidence that any of those hired for the project in question was a member; Rose pointedly extracted information from applicants about their membership and sympathies, presumably as a winnowing tool; and Imdieke's initial response, when asked if Respondent ever hired union members, was, ''That's a tough one.'' Even more revealing, Rose told Jones that the no-applicants sign was ''just for the Union's benefit,'' and he advised Macomber that Respondent ''couldn't accept applications from a labor organization.''[32]

3. Respondent's resolute antiunionism also is revealed by Rose's telling Hendrix in their early conversations that it was ''nonunion and wanted to stay that way''; and by his later saying much the same to Jones.[33]

4. Hendrix gave Respondent cause to believe he would be an aggressive and dedicated organizer. Beyond being paid to organize, he proposed to Imdieke and Rose that Respondent enter into an agreement with the Union, he urged them to use the Union as a manpower source and submitted applications on behalf of a number of members, he picketed and leafleted to protest Respondent's wage and benefit levels, and he candidly told Rose that, if hired, he would organize during nonwork time.

5. Respondent plainly saw Hendrix as an organizational threat. Thus, Rose entered in his log after their first meeting that Hendrix gave him ''the impression that'' the Union had ''targeted [Respondent] for infiltration of union members''; Rose discussed ''the union issue'' with Imdieke and Johnson after his second conversation with Hendrix, and they decided not to give out applications ''until all angles have been checked''; Rose and Johnson had a follow-up conversation dealing with ''hiring policies concerning union help, discrimination''; Imdieke conferred with Respondent's labor counsel before answering Hendrix's request for an application; Rose forwarded only Hendrix's application to Imdieke, whereupon Imdieke again conferred with labor counsel; Rose told Casavant, when Casavant submitted his application, that Hendrix had ''come by'' and Respondent ''might be going union'';[34] Rose told Hendrix he ''wouldn't like'' his organizing during nonwork time, were he to be hired; and Rose questioned Brooks whether he knew Hendrix, whom he identified as ''our little union buddy,'' after Hendrix had engaged Brooks in conversation while leafleting at the jobsite.

6. By telling Hendrix on December 30 that, although Respondent was then hiring, his application had not been considered because ''it's kind of hard to hire you when you're out there on the other side, picketing,'' Rose effectively admitted that Hendrix's protected activities were a factor in his nonhire.[35]

I further conclude that Respondent has failed to overcome the prima facie showing. As Respondent states in its brief, incorporating Rose's and Imdieke's testimony, its principal reason ''for refusing to hire Hendrix was that neither Rose nor Imdieke took his application seriously . . . since it was submitted pursuant to, and in furtherance of his full-time union employment responsibilities.'' This is an admission on improper motive.[36] Far from overcoming the prima facie case, it bestows conclusivity.[37]

Respondent contends that it had an additional, less basic, reason for not hiring Hendrix—that he had indicated on his application that he was interested only in a foreman's job, and none was available. As earlier noted, Hendrix entered ''Journeyman-Foreman Electrician'' where the application asked for ''Position Desired.'' Rose never sought clarification from Hendrix about this, however, which he surely would have done, given the equivocal form of the entry, had he an open mind about Hendrix; and the weight of evidence is overwhelming that the application would not have been taken any more seriously had Hendrix written ''Journeyman Electrician.''

(c) *Haugen*

I conclude that the General Counsel also has made a prima facie showing that Respondent's failure to hire Haugen violated Section 8(a)(3) and (1). My reasons for so concluding, in addition to the previously detailed indicia that Respondent has a policy against hiring known union members and otherwise is ardently antiunion, are:

1. Haugen, like Hendrix, apparently is a competent journeyman.

2. The weight of evidence reveals that Respondent was still seeking journeymen when Haugen applied on December 28, and for at least several days after. Thus, when Haugen first told Rose on December 28 that he is a journeyman, Rose exclaimed, ''Oh, great!'' and urged Haugen to apply ''right away'';[38] then, on December 30, Rose told Hendrix he was ''looking for guys''; and Rose informed journeyman Joseph Lesh in early January that he ''would be hiring.''[39] Additionally, Rose informed the employment service on December 27 that he invited the referral of ''journeymen and other experienced electricians,'' leaving that directive undisturbed until January 13; and one of the local-area journeymen hired by Respondent, Casavant, did not receive confirmation of his hire until January 3.[40]

3. Rose's asking Haugen if his past employers were unionized was, as previously observed, ''a thinly-veiled inquiry into Haugen's union feelings;''[41] and, from Haugen's affirm-

[32] Crediting Macomber's convincing and uncontroverted account.

[33] Citing *Indian Head Lubricants*, 261 NLRB 12, 18 (1982), the General Counsel argues that Respondent's union animus also is shown by the remarks of Rose's son, Todd. I need not address that in light of abundance of other indicia.

[34] Crediting Casavant's unchallenged testimony.

[35] As I earlier conclude, this remark was unlawful. See text accompanying fn. 25, supra.

[36] The record being devoid of evidence that Hendrix applied in bad faith, with no intention of taking a job if offered.

[37] *H. B. Zachry Co.*, supra.

[38] Crediting Haugen. Rose recalled saying, ''Good,'' and inviting Haugen to come to the site. I do not credit Rose that he told Haugen, after he had filled out an application, that Respondent ''didn't need any more journeyman electricians'' because he had ''made up [his] mind who [he] was going to hire.'' That testimony was not convincingly rendered, and, as is elsewhere noted, conflicts with the information Rose gave to the employment service on December 27, to Hendrix on December 30, and to Joseph Lesh in early January.

[39] Lesh, uncontroverted, is credited.

[40] Crediting Casavant. Respondent states in its brief that Casavant testified ''that he had been offered employment in early December and that he quit his other job in reliance upon that offer.'' This is not accurate. Casavant testified, as earlier set forth, that Rose told him in early December that he ''probably'' could start on January 3 or 4, and that he quit his job on December 23 because he was ''tired'' of it and ''thought [he] had a pretty good chance of getting this job'' with Respondent.

[41] As I earlier conclude, this interrogation was unlawful. See text accompanying fn. 22, supra.

ative response, Rose had reason to surmise that he is a member.

I conclude, finally, that Respondent has not overcome the prima facie showing. Its defense is based on Rose's testimony that he ''had made up [his] mind'' before December 14 ''who [he] was going to be putting on as a journeyman,'' and that he had made commitments to the three hired on December 1 (Casavant), December 15 (Gauthier), and December 27 (Jones). That story is fundamentally impeached, however, by the considerable evidence, summarized above, that Rose was still seeking journeymen when Haugen applied on December 28, and for some days thereafter; by the records of the employment service, which disclose that he advised it on December 14 that Respondent ''need[ed] journeymen and other experienced electricians''; and by the passage in his affidavit that he ''was actually looking for . . . 5 journeymen'' when he placed the December 14 order with the employment service.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) by failing to hire Michael C. Hendrix and Allen Haugen, effective January 3, 1989.

2. Respondent, by its project foreman, Douglas Rose, further violated Section 8(a)(1) as follows:

(a) In late November 1988, by asking applicant Jerry Jones if he was ''still affiliated with the Union'' and how he felt ''about working for a nonunion shop.''

(b) In late November 1988, by telling Jones that Respondent ''is nonunion and it intends on staying nonunion.''

(c) On December 28, 1988, by asking Haugen if his past employers were unionized.

(d) On December 30, 1988, by telling Hendrix that he had not ''considered'' Hendrix's application because ''it's kind of hard to hire you when you're out there on the other side, picketing.''

(e) On January 9, 1989, by asking employee Lafayette (Dean) Brooks if he knew Hendrix, ''our little union buddy.''

(f) In mid-January 1989, by telling Jones that a no-applicants sign was ''just for the Union's benefit.''

(g) On February 7, 1989, by asking Jones if an NLRB agent had called him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Willmar Electric Service, Inc., Silverdale, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

(b) Interrogating job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

(c) Telling job applicants that Respondent is nonunion and intends to stay nonunion.

(d) Telling job applicants that it has not considered their applications because of their union activities.

(e) Coercively interrogating employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

(f) Telling employees that a no-applicants sign is ''just for the Union's benefit.''

(g) Coercively interrogating employees, during the pendency of an unfair labor practice charge against Respondent, whether they had been called by an NLRB agent.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by the Act.

2. Take this affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for Respondent's unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and make them whole, with interest where appropriate, for any losses of earnings and benefits suffered as a result of that discrimination.[43]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its J. C. Penny project in Silverdale, Washington, and at its headquarters in Wilmar, Minnesota, copies of the attached notice marked ''Appendix.''[44] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[42] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[43] Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizon*, interest is computed at the ''short-term Federal rate'' for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The trial held in Seattle, Washington, on April 6–7, 1989, in which we participated and had a chance to give evidence, resulted in a decision that we have committed unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, and this notice is pursuant to that decision.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of the International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT interrogate job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

WE WILL NOT tell job applicants that we are nonunion and intend to stay nonunion.

WE WILL NOT tell job applicants that we have not considered their applications because of their union activities.

WE WILL NOT coercively interrogate employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT tell employees that a no-applicants sign is ''just for the Union's benefit.''

WE WILL NOT coercively interrogate employees, during the pendency of an unfair labor-practice charge against us, whether they had been contacted by an NLRB agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act.

WE WILL offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for our unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and WE WILL make them whole, with interest, for any losses of earnings and benefits suffered as a result of that discrimination.

WILLMAR ELECTRIC SERVICE, INC.